United States Department of Labor Employees' Compensation Appeals Board

J.K., Appellant)
and) Docket No. 13-25) Issued: February 6, 2014
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY) issued. February 0, 2014
ADMINISTRATION, Newark, NJ, Employer))
Appearances: Thomas R. Uliase, Esq., for the appellant Office of Solicitor, for the Director	Case Submitted on the Record

ORDER REMANDING CASE

Before: RICHARD J. DASCHBACH, Chief Judge

PATRICIA HOWARD FITZGERALD, Judge MICHAEL E. GROOM, Alternate Judge

On October 3, 2012 appellant, through counsel, filed an application for review of a decision of the Office of Workers' Compensation Programs (OWCP) dated June 13, 2012. The appeal was docketed as No. 13-25.

This is the second appeal before the Board. OWCP accepted conditions of right knee sprain/strain, tear of right lateral meniscus and tear of right medial meniscus. Appellant requested a schedule award based on a partial loss of use of his right lower extremity. He submitted a June 12, 2008 report from Dr. David O. Weiss, an osteopath, who found that appellant had a 15 percent impairment of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*). OWCP's medical adviser reviewed Dr. Weiss' report and found that appellant had a five percent impairment of the right lower extremity pursuant to the fifth edition of the A.M.A., *Guides*. OWCP found that there was a conflict in the medical evidence regarding the degree of impairment stemming from appellant's accepted right knee condition and referred him to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for a referee medical examination. In an October 5, 2009 report, Dr. Dennis found that appellant had a seven percent permanent impairment of the right lower extremity rating in conformance with the updated, sixth edition of the A.M.A., *Guides*, which became effective as of May 1, 2009. By decision dated January 6, 2010, OWCP granted appellant a schedule award for a seven percent permanent impairment of

the right lower extremity. By decision dated March 29, 2010, OWCP's hearing representative affirmed the January 6, 2010 decision. In an order dated June 28, 2011, the Board set aside the March 29, 2010 OWCP decision. It found that this decision was flawed because the hearing representative made no findings and because the only reason provided for relying on Dr. Dennis' opinion was that it was the only impairment rating rendered in conformance with the sixth edition of the A.M.A., *Guides*. The Board remanded the case to OWCP for consideration of the medical evidence pursuant to the standards set out in section 8128(a) and section 20 C.F.R. § 10.126. By decision dated November 15, 2011, OWCP found that appellant was not entitled to an additional schedule award greater than a seven percent impairment. By decision dated June 13, 2012, the hearing representative affirmed the November 15, 2011 decision.

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, an impartial medical referee, who shall make an examination. Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the impartial medical referee. The selection of referee physicians is made from a strict rotational system. OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case. In turn, the Director delegated authority to each district OWCP for selection of the referee physician initially by use of the Physicians' Directory System and currently by the Medical Management Application within iFECS. These applications contain the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas. The procedures provide for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association and those physicians, who are Board-certified with the American Osteopathic Association.

Selection of the referee physician is made through use of the application by a medical scheduler. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. The record indicates that on June 17, 2009 a medical scheduler undertook selection of an impartial medical examiner. Dr. Christopher Spagnuola, a Board-certified orthopedic surgeon, was the first physician selected. In a July 2, 2009 OWCP memorandum, it was indicated that his initial selection was bypassed because he did not perform schedule award examinations. On July 9, 2009 the referee medical examination was rescheduled. The second physician selected was Dr. Dennis. There are no screen shots of record documenting the final selection of him. The June 17, 2009 screenshot however indicates that Dr. Dennis appeared more than once in the

¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

² *Id.* at Chapter 3.500.4(b)(1).

³ *Id.* at Chapter 3.500.4(b)(6).

⁴ *Id.* at Chapter 3.500.4(b)(6)(a).

⁵ *Id.* at Chapter 3.500.5.

⁶ *Id.* at Chapter 3.500.5(b).

rotational system, under different identification numbers.⁷ The Board has previously stated that OWCP must adequately document why a physician would appear twice in a strict rotational selection system or why differing information pertaining to the same physician would appear in the system.

OWCP has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP. OWCP has not established that it properly followed its selection procedures. On remand it shall select another impartial medical examiner to evaluate appellant's permanent impairment. After such further development as necessary, OWCP shall issue an appropriate decision to protect appellant's appeal rights.

IT IS HEREBY ORDERED THAT that this case be remanded for referral to an impartial medical examiner to evaluate appellant's permanent impairment.

Issued: February 6, 2014 Washington, DC

> Richard J. Daschbach, Chief Judge Employees' Compensation Appeals Board

> Patricia Howard Fitzgerald, Judge Employees' Compensation Appeals Board

> Michael E. Groom, Alternate Judge Employees' Compensation Appeals Board

⁷ *K.P.*, Docket No. 13-1042 (issued September 17, 2013).

⁸ Raymond J. Brown, 52 ECAB 192 (2001).

⁹ As OWCP has not properly resolved the conflict of medical opinion regarding the degree of appellant's permanent impairment, the issues regarding his schedule award and overpayment of compensation are not in posture for decision.